

84-157

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CASE NO: \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JOHN BEER,

Petitioner-Appellant,

-vs-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

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PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT  
OF THE UNITED STATES

WILLIAM JOHN BEER,

Petitioner-Appellant,

-vs-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

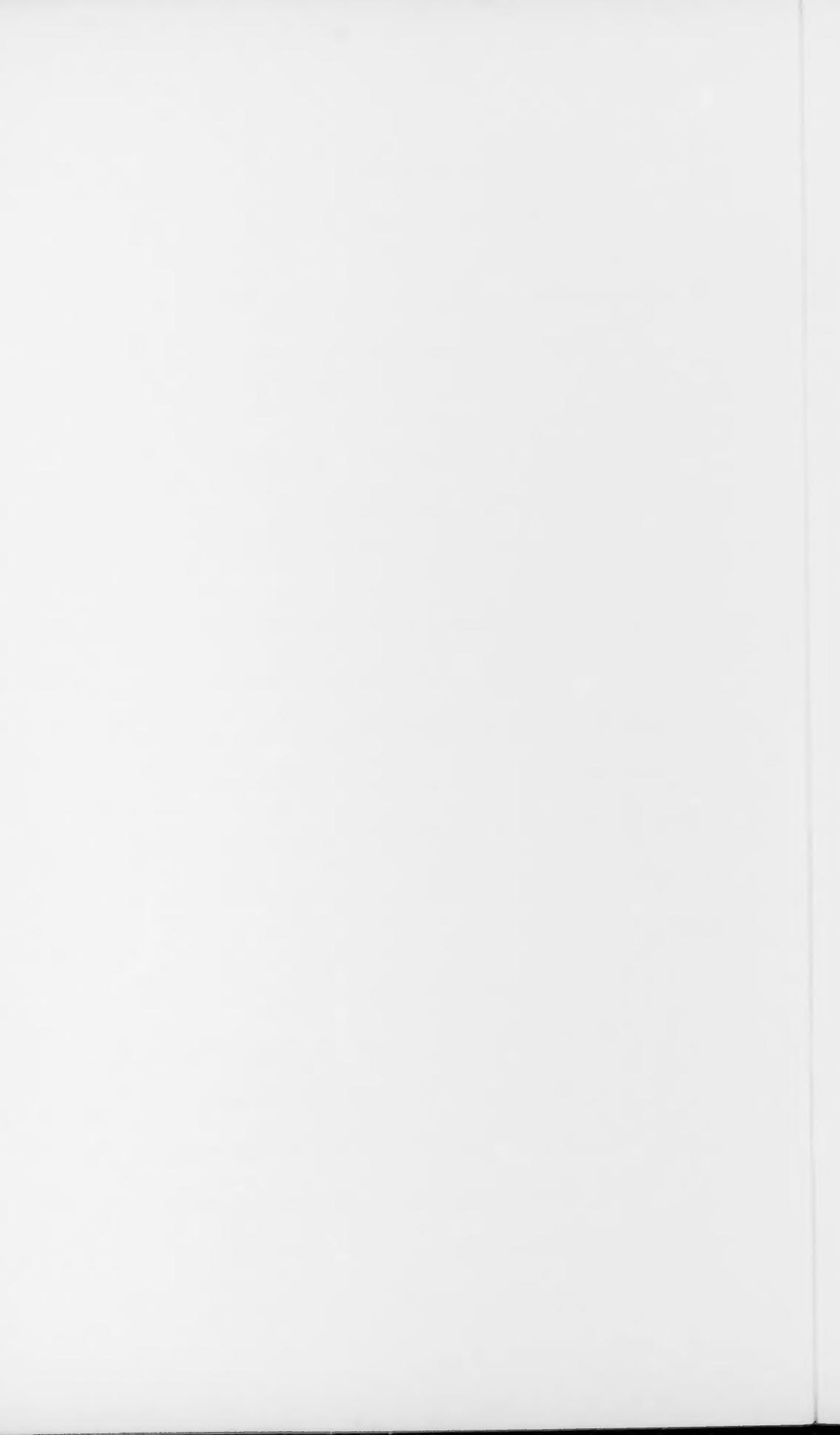
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QUESTIONS FOR REVIEW

1. Was the Respondent

Commissioner's determination not timely,  
but barred by the two-year statute of  
limitations provided in Section 6532(b)  
of the Internal Revenue Code, asserting  
that:

(a) Respondent's attempt to  
recover an erroneous refund  
may only be done through the  
institution of suit by respon-  
dent against the petitioner  
under the provisions of  
Section 7405, and within



two (2) years of such refund,

under Section 6532(b), and

(b) The several successive extensions of the statute of limitations granted by Petitioner to Respondent were void for lack of consideration.

2. Was the Respondent Commissioner estopped from attempting to recover amounts of income tax previously withheld from Petitioner's salary but subsequently refunded by Respondent to Petitioner?

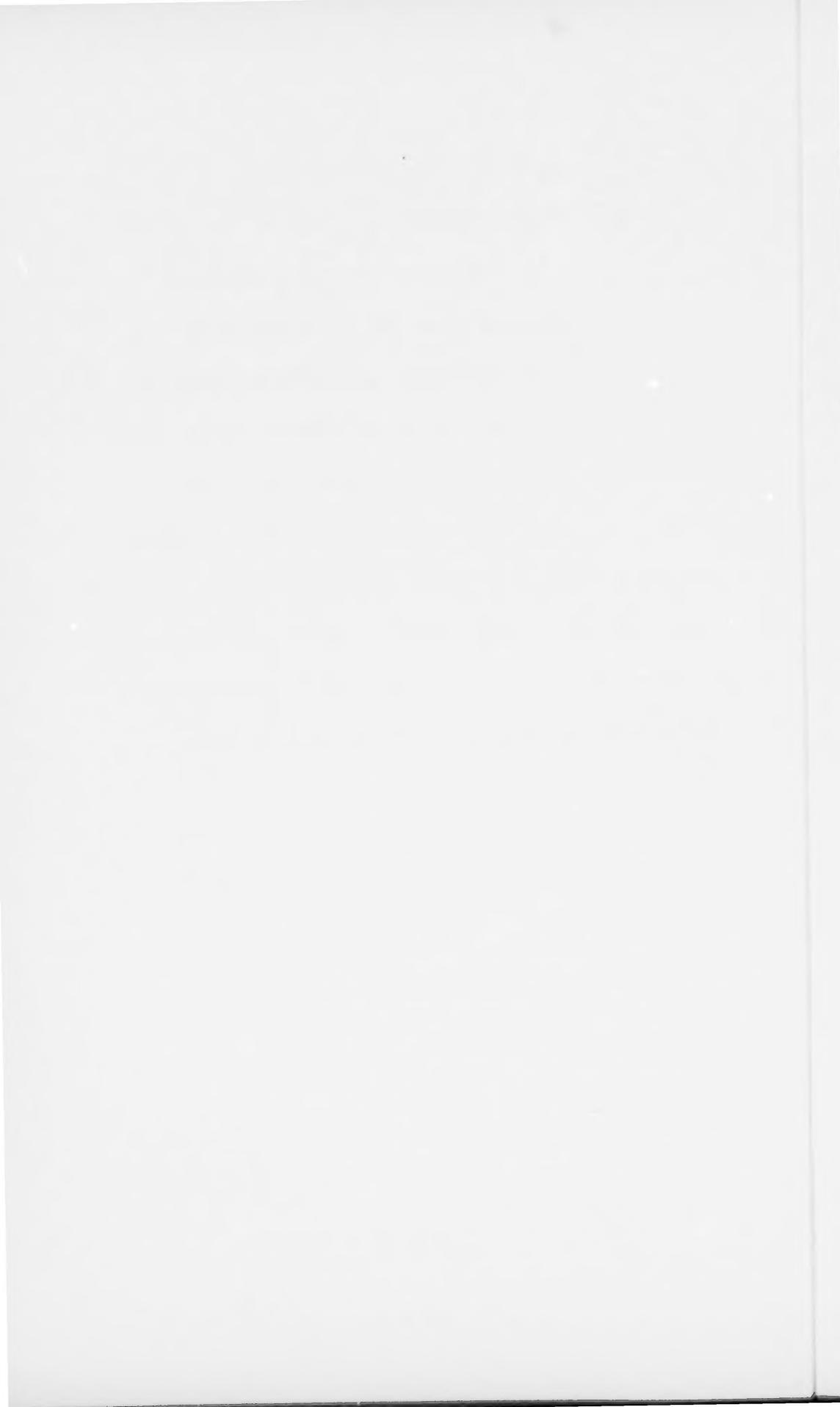


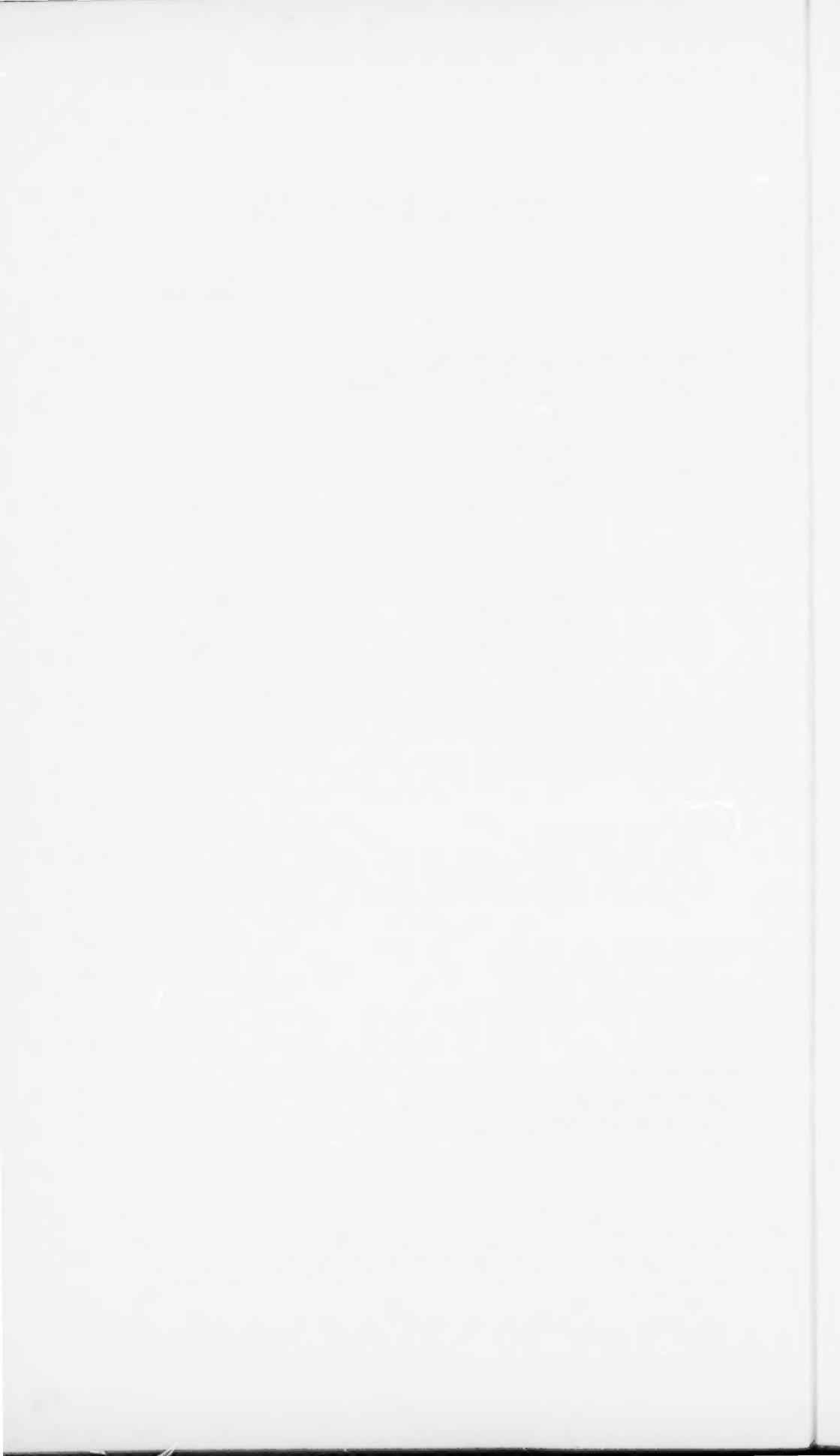
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PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioner,  
WILLIAM JOHN BEER, by and through his  
attorney, ROBERT W. GAGNIUK, and in sup-  
port of his Petition for Writ of Certiorari  
indicate as follows:

CONCISE STATEMENT OF THE  
GROUNDS OF JURISDICTION

The jurisdiction of this Court  
is invoked pursuant to 28 USCS §1254.

The date of the judgment sought  
to be reviewed is December 27, 1982  
(Judgment of the United States Tax Court,  
T.C. memo 1982-735, Docket No. 19469-80).

CONCISE STATEMENT OF THE CASE

NOW COMES the Petitioner,  
WILLIAM JOHN BEER, by his attorney,  
ROBERT W. GAGNIUK, and in support of his  
Petition for Writ of Certiorari, indicates  
as follows:

1. The Petitioner, WILLIAM  
JOHN BEER, filed income tax returns for



the tax years 1972, 1973, 1974 and 1975.

Attached to such returns were the forms W-2 setting forth the compensation received by him for his services as a Circuit Court Judge for the State of Michigan, and statements signed by him in which he stated that his compensation as a state judge was constitutionally exempt from income taxes. On this basis, he requested refunds of the amounts that had been withheld from his salary, and the refunds were made by the Commissioner of Internal Revenue.

2. The Respondent, COMMISSIONER OF INTERNAL REVENUE, later determined deficiencies in income tax for the years in question all of which are in dispute, as follows:

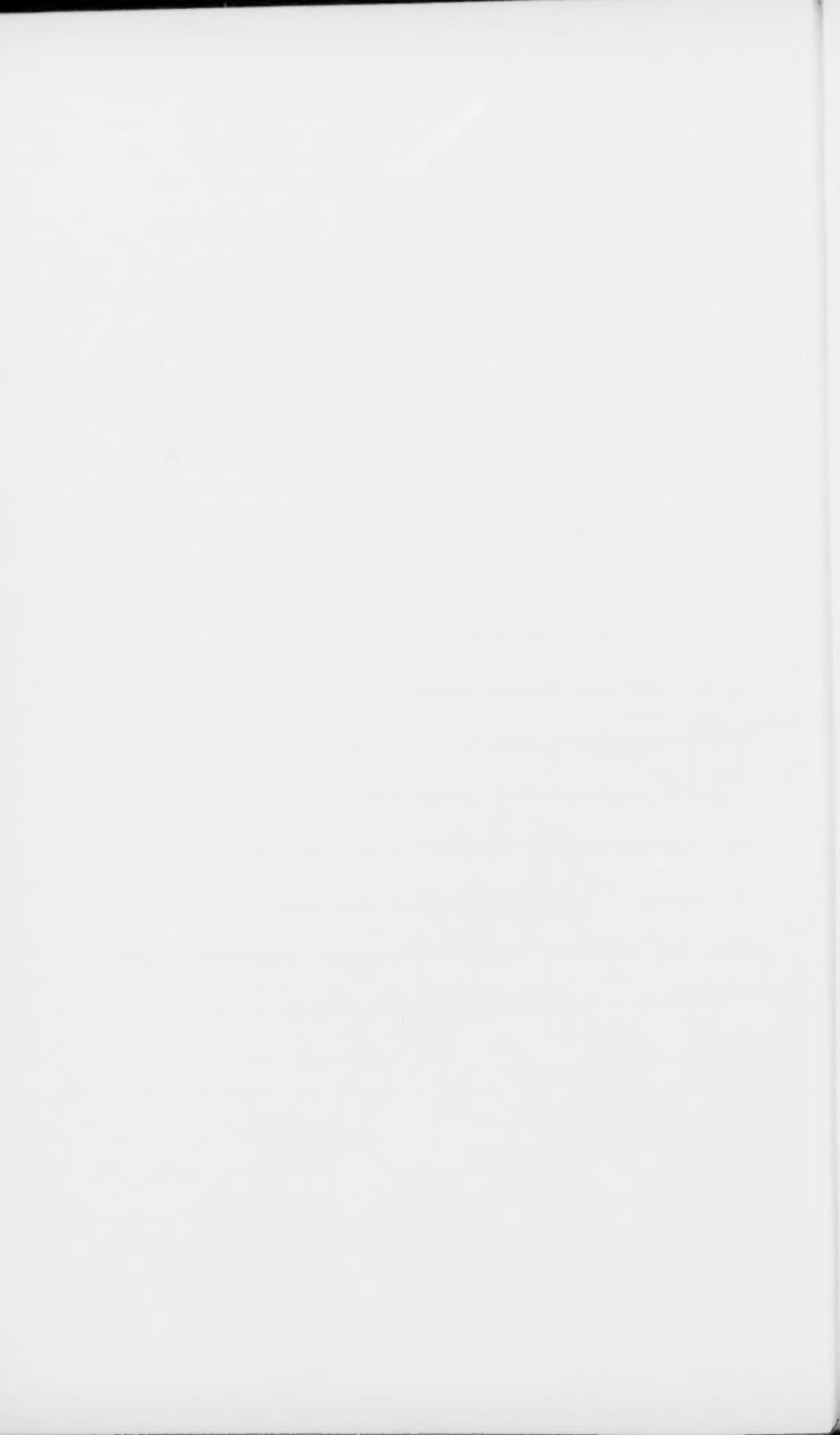
<u>Calendar year</u>	<u>Amount</u>
1972	\$ 8,385.54
1973	9,007.58
1974	6,728.69
1975	6,500.71
	<u>\$30,622.52</u>



3. Notice of deficiencies was mailed to the Petitioner by the Respondent on July 25, 1980 and the Petitioner duly filed his Petition for Redetermination of the deficiencies. A Motion for Summary Judgment was filed by the Respondent Commissioner of Internal Revenue, and the Tax Court Judge, Jules G. Korner III granted the Commissioner's Motion.

4. A Motion for Reconsideration filed by the Petitioner was denied by Tax Court Judge Jules G. Korner, III.

5. The judgment of Judge Korner was appealed to the United States Court of Appeals for the Sixth Circuit (No. 83-1386), which affirmed the decision of the Tax Court on May 8, 1984.

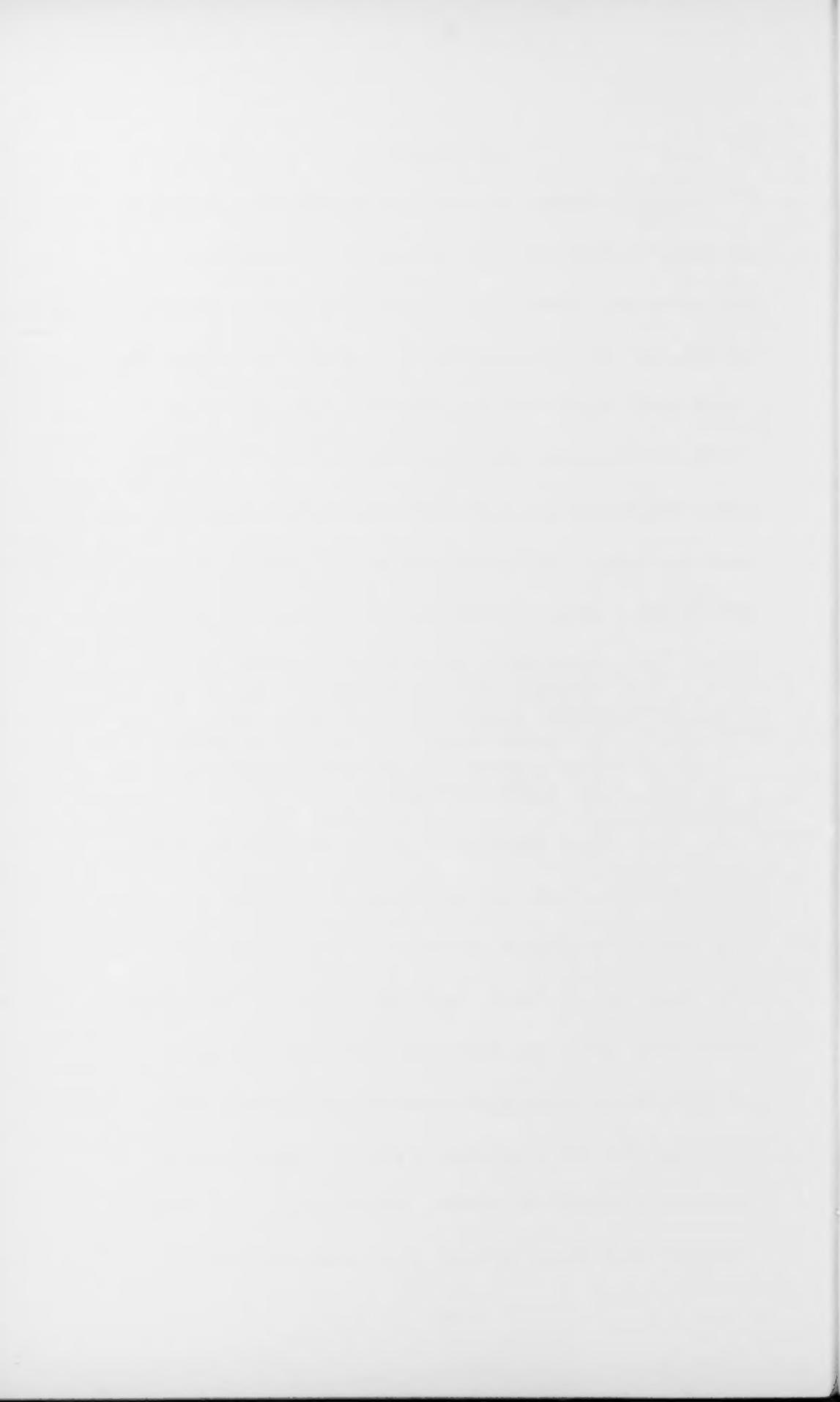


## ARGUMENT

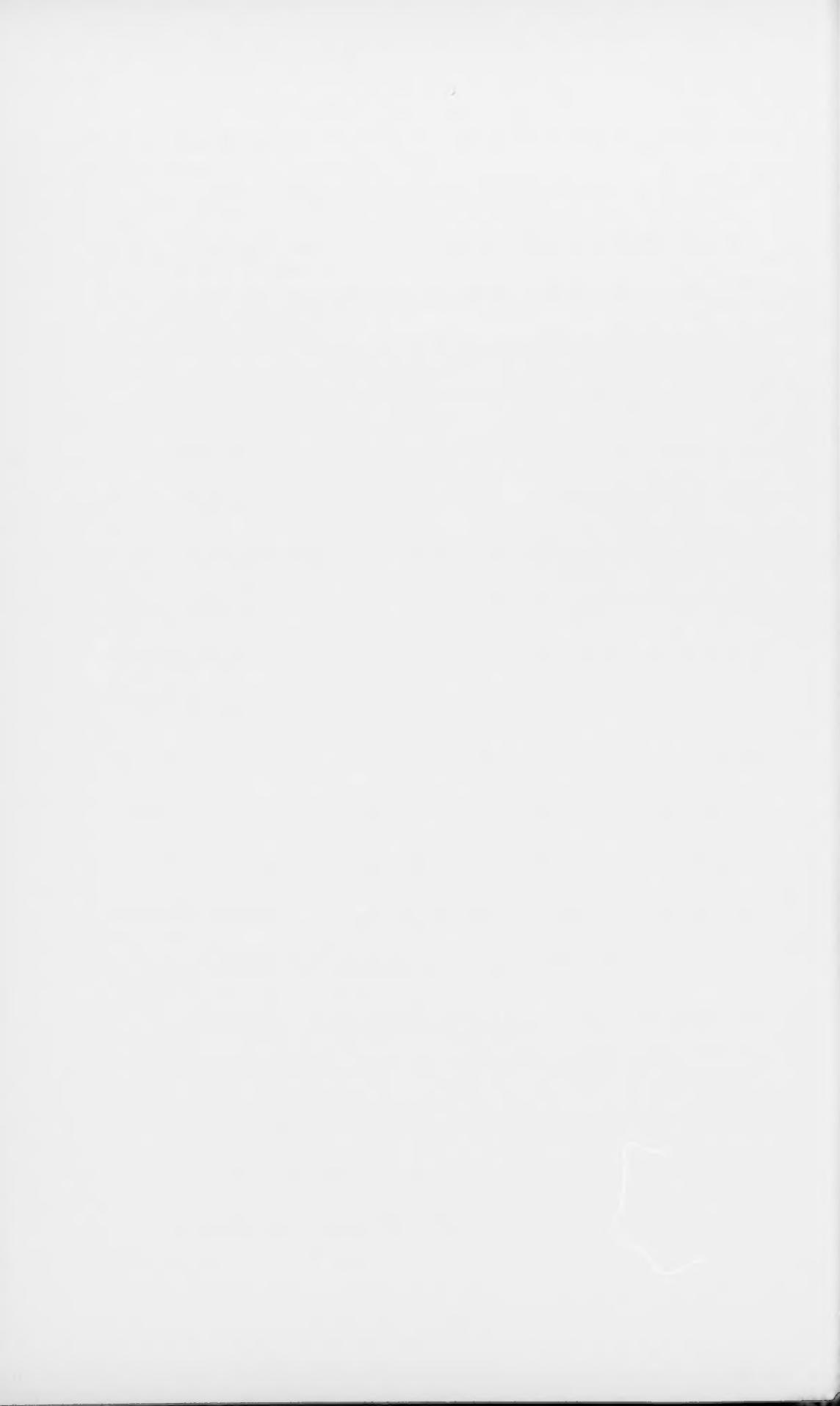
Judge Korner granted the Commissioner's Motion for Summary Judgment, opining that the Commissioner's determination of income taxes, made on July 25, 1980 and concerning the tax years 1972 - 1975 inclusive was not barred by the two year statute of limitations provided in the Internal Revenue Code of 1980, Ch. 66, §6532(b), which states:

Recovery of an erroneous refund by suit under Section 7405 shall be allowed only if such suit is begun within two years after the making of such refund . . .

The United States may institute suit to recover an erroneous refund if the suit is begun within 2 years after the making of such refund. If it appears that any part of the refund was induced by fraud or misrepresentation, suit may be brought at anytime within five years. Internal Revenue Code, §6532(b). If the refund was made after the expiration of



the period of limitations for filing of a claim for refund by the taxpayer, the United States may bring suit to recover the refund after the limitations period of §6532(b) where no claim has been filed or the claim was timely filed and disallowed by the Secretary. The Government may also bring suit to recover refunds termed otherwise erroneous. Internal Revenue Code, §7405. With respect to "refunds otherwise erroneous", it has been said that a person who has conferred a benefit upon another because of an erroneous belief induced by mistake of law that he is under a duty to do so is entitled to restitution as though the mistake were one of fact when the benefit is conferred by the state. United States v. Russell Mfg. Co., 349 F 2d 13 (2 Cir 1965). In order to prove a case for recoupment of erroneous refund, the government must establish that the refund was erroneous



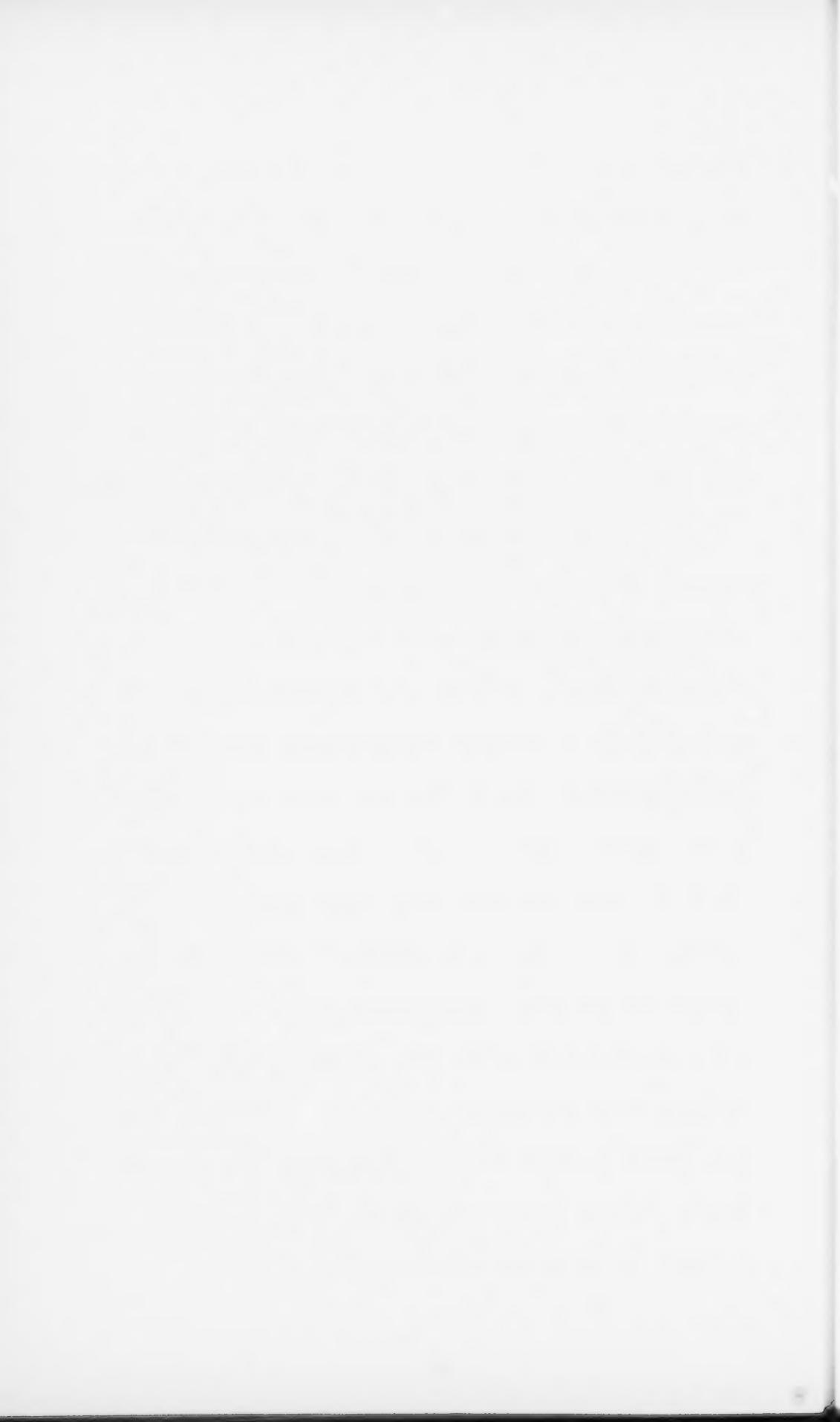
and the amount of the refund. United States v. Augspurger, 452 F. Supp 659 (D.C. N.Y. 1978). The two-year period of limitation for recovery of erroneous refunds generally begins to run from the making of payment and not from the allowance of the refund. United States v. Woodmansee, 388 F. Supp 36, rev'd on other grounds, 578 F. 2d 1302 (D.C. Cal 1975).

The provisions of the Internal Revenue Code requiring the government's action for recovery of a tax refund to be instituted within 2 years after payment must be given a liberal construction in favor of the taxpayer. United States v. Walker-Hill Co., 79 F. Supp 482 (D.C. Pa 1948). The Internal Revenue Code of 1939 contained a provision similar to §6532 of the current code forbidding suit by the government to recover an erroneous refund beyond the 2 year period. The



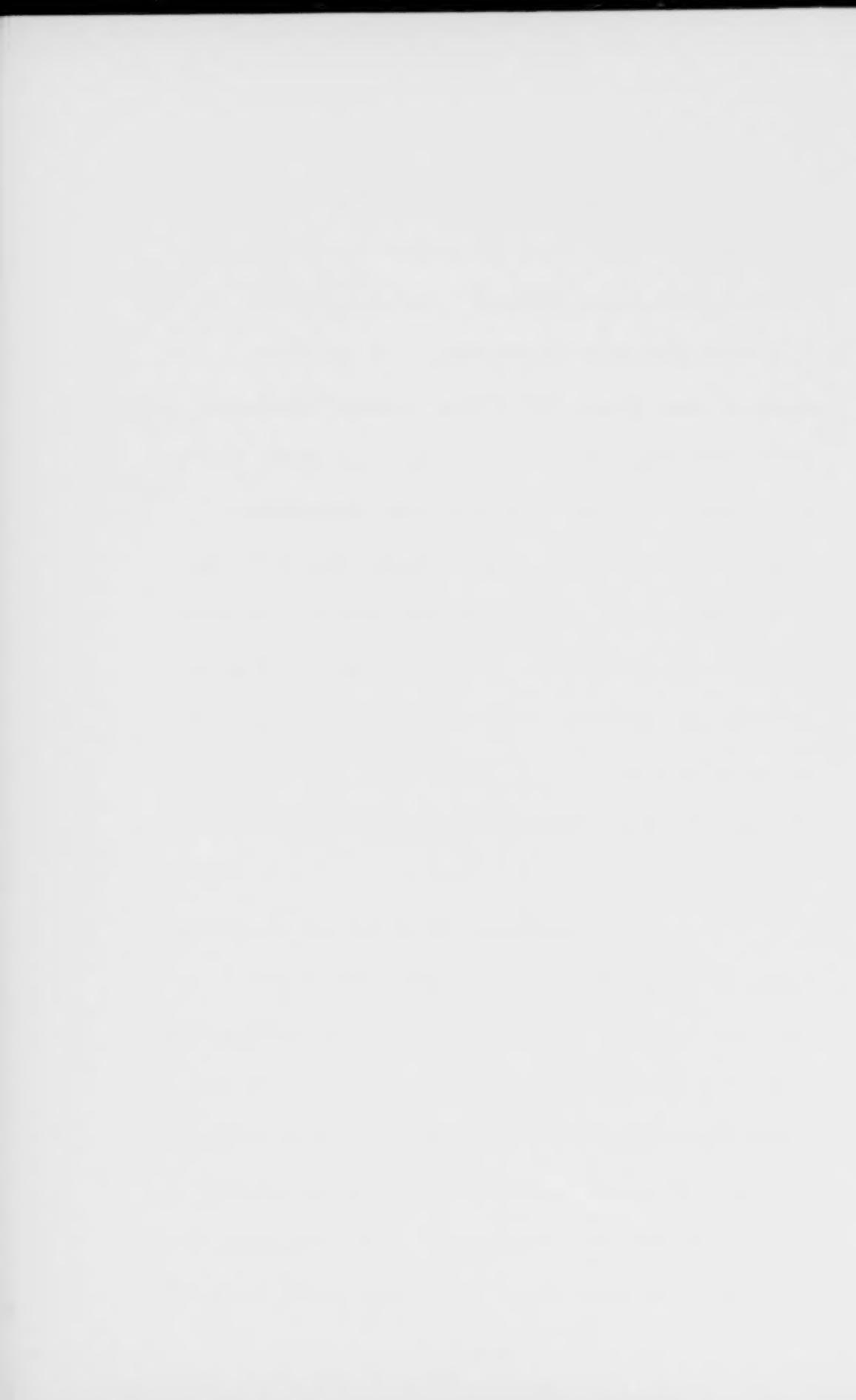
current provision and its predecessor did not create a new right in the government, but are a limitation on the government's long-established right to sue for money wrongfully or erroneously paid from the public treasury. United States v. Wurts, 303 US 414; 58 S Ct 637; 82 L Ed 932 (1938).

According to the Commissioner, he can alternatively proceed under the deficiency procedure of sections 6211 through 6216. It is the Commissioner's claim that once the deficiency procedures are employed, then the statute of limitations under section 6501 (a) is applicable rather than the two (2) year period specified in section 6532(b) relating to suits to recover erroneous refunds. Judge Beer disagrees with the Commissioner's remedy for recovery of a refund where the two year period of limitations has passed. Here, Judge Beer has at no time induced a refund by misrepresentation.



According to the Commissioner, the refund tendered to Judge Beer was an "administrative refund" and therefore it was erroneously refunded. At no time during the years of 1972, 1973, 1974 or 1975 did the Petitioner and his wife fail to disclose their reason for demanding the refund. Thus, the refund was not an administrative refund which would entitle the Commissioner to claim recovery for an erroneous refund. He was given a refund only after he fully disclosed and lawfully explained his reason on each and every tax return.

The ultimate purpose of section 6211 through 6214 is to provide a fair and workable formula under which taxpayers and the government might be given relief from the unfair and unjust results occasioned by corrections, final determinations of errors of either the taxpayer or the commissioner, or both, with respect



to items affecting tax liability in more than one year. Yet this section should not be so strictly construed that its purpose is defeated. Taxeraas v. United States, 269 F 2d 283 (8th Cir 1959).

Hence, in the case now before this Court, Judge Beer fully and completely disclosed his reason for claiming income tax refunds, that his compensation as a state court judge was exempt from income taxation. The appellee Commissioner, with full knowledge of the reason by which tax exemption was claimed, made the refunds. If the refunds were in fact made in error, as claimed by the Commissioner, the Commissioner is nonetheless barred from recovering the refunds by the plain language of Section 6532(b), Internal Revenue Code.

The rule is that where a party with full knowledge, or with sufficient notice or means of knowledge, of his rights



and of all the material facts, remains inactive for a considerable time or abstains from impeaching a contract or transaction, or freely does what amounts to a recognition thereof as existing, or acts in a manner inconsistent with its repudiation and so as to affect or interfere with the relation and situation of the parties, so that the other party is induced to suppose that it is recognized, this amounts to acquiescence and the transaction, although originally impeachable, becomes unimpeachable. Presque Isle County v. Presque Isle County Savings Bank, 315 Mich 479, 24 NW 2d 186.

The doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice and its purpose is to forbid one to speak against his own acts, representations, or commitments to the injury of one to whom they were directed and who reasonably



relied thereon. Although estoppel is sometimes said to be a mere rule of evidence, it is in reality one of substantive law, for the reason that it absolutely precludes a person from asserting what otherwise would be his right.

Here, the Commissioner had full knowledge of the facts and circumstances when he made refunds during the tax years of 1972, 1973, 1974 and 1975. The conduct of the Commissioner in allowing refunds for these years amounts to acquiescence on behalf of the Government. Issuing a Notice of Deficiency on July 25, 1980 for refunds during the tax years of 1972, 1973, 1974 and 1975 is too late and the Government is now guilty of laches and should not be heard to voice its protest to a situation which they have created.

The "acquiescence", as the term is here used, refers to an implied consent and need not involve anything in the



nature of a positive affirmation. Yet, as has already been pointed out, Judge Beer at all times did disclose and lawfully report, but did not include in gross income for 1972, 1973, 1974 and 1975 the compensation that he received for his judicial services. The Commissioner's silence or inaction under these circumstances, amounts to acquiescence and does afford grounds for Petitioner to believe that acquiescence was intended.

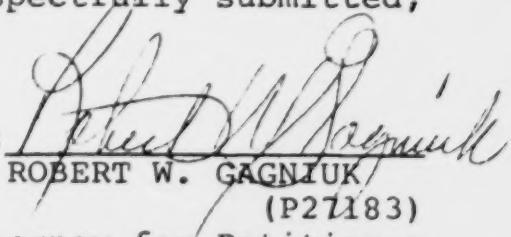
Further, the Commissioner is asking to recover an administrative refund that was "erroneously" made to Petitioner without first presenting facts that would indicate an administrative error. It is the position of Judge Beer that refunds for the tax years ending December 31, 1972 through December 31, 1975, were not erroneously made. Petitioner's income tax returns clearly showed that his income was being excluded and the Commissioner



nevertheless made full refunds of the taxes withheld from salaries as shown on those returns, all at a time when the Government was aware that litigation concerning Petitioner was pending before the Federal Courts.

Respectfully submitted,

BY:

  
ROBERT W. GAGNIUK

(P27183)

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T. C. Memo. 1982-735

UNITED STATES TAX COURT

WILLIAM J. BEER, Petitioner v.  
COMMISSIONER OF INTERNAL REVENUE,  
Respondent

Docket No. 19469-80. Filed December 27,  
1982.

Robert W. Gagniuk, for the petitioner

Kevin W. Cobb, for the respondent.

MEMORANDUM OPINION

KORNER, Judge: This matter is before the Court on respondent's motion for summary judgment, filed pursuant to the provision of Rule 121 of the Tax Court's Rules of Practice and Procedure.<sup>1</sup> This motion was noticed for argument at a trial session of

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<sup>1</sup> Unless otherwise indicated, all rule references herein are to the Tax Court Rules of practice and Procedure, and all statutory references are to the Internal Revenue Code of 1954, as in effect in the years in issue.

Served: Dec. 27, 1982.



the Court at Detroit, Michigan.

Respondent determined deficiencies in income tax against petitioner on July 25, 1980 for the following calendar years and in the following amounts:

<u>YEAR ENDING DECEMBER 31</u>	<u>DEFICIENCY</u>
1972	\$8,385.54
1973	9,007.58
1974	6,728.69
1975	6,500.71

Said determinations of deficiency were based upon respondent's determination that the salary received by petitioner in the years in issue for his services as a Michigan state court judge were taxable income to him under the Internal Revenue Code.

At the time of his timely petition herein, petitioner was a resident of Berkley, Michigan. In his petition, petitioner asserts error as to respondent's determinations on the following grounds:



1. Petitioner asserts that respondent's determination is not timely, but is barred by the two-year statute of limitations provided in section 6532(b), asserting that:

(a) Respondent's attempt to recover an erroneous refund may only be done through the institution of suit by respondent against petitioner under the provisions of section 7405, and within two years of such refund, under section 6532(b), and

(b) The several successive extensions of the statute of limitations granted by petitioner to respondent were void for lack of consideration;

2. Petitioner asserts that respondent erred in attempting to impose the Federal income tax on his salary as a Michigan state court judge, petitioner claiming that such salary is constitutionally immune from tax;

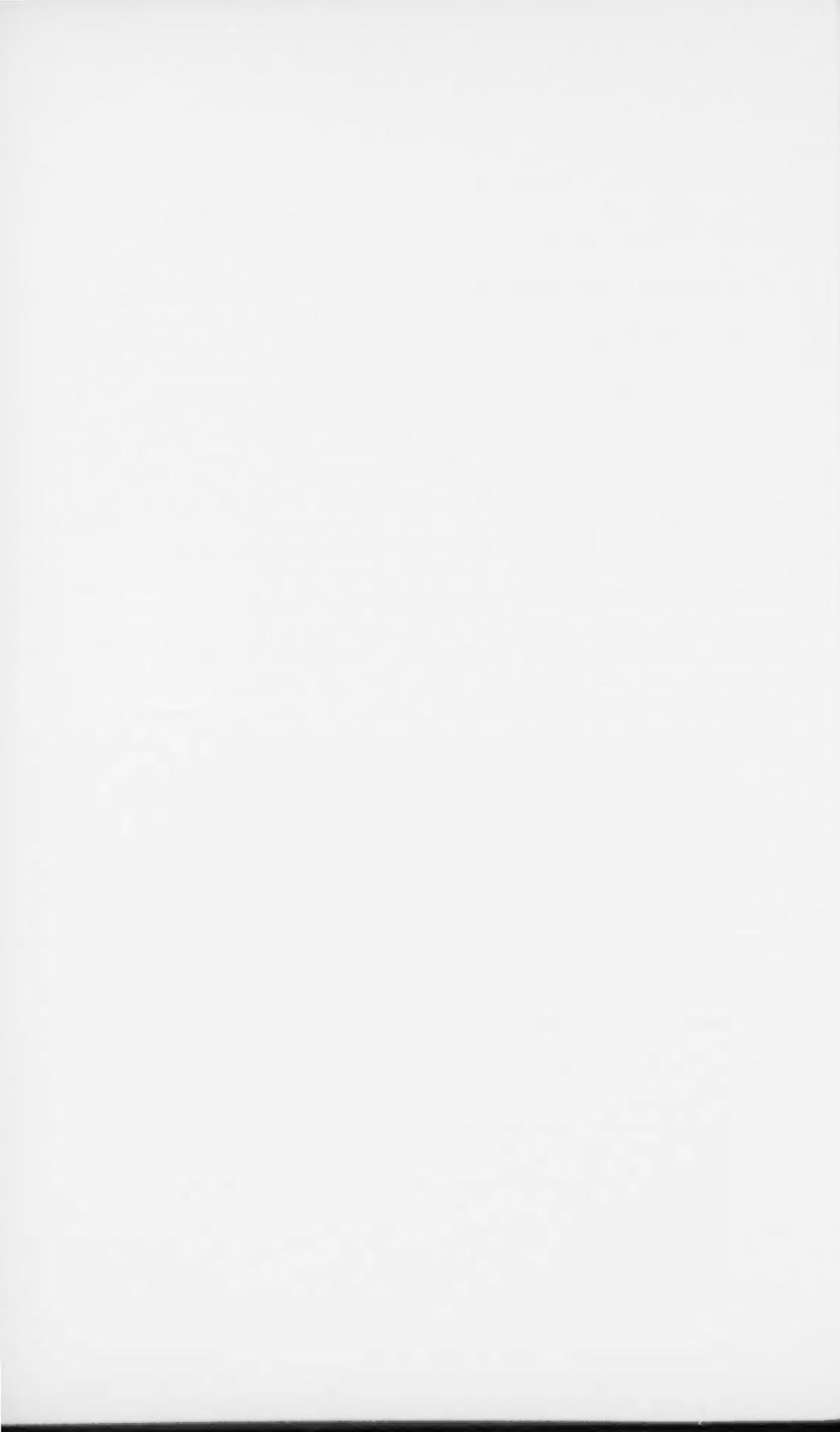


3. Petitioner asserts that respondent is estopped from attempting to recover amounts of income tax previously withheld from petitioner's salary in said years but subsequently refunded by respondent to petitioner.

Respondent's answer, in addition to denying that he had erred as alleged by petitioner, affirmatively alleged a claim for damages against petitioner for instituting proceedings before this Court merely for delay, under the provisions of section 6673. Respondent then timely moved for summary judgment in his favor upon all the issues above presented.

Respondent, as the party moving for summary judgment in this case, has the burden of demonstrating that no genuine issue as to any material fact exists, and that he is entitled to judgment as a matter of law. Adickes v.

S.H. Kress & Co., 398 U.S. 144, 157 (1970);



Gulfstream Land and Development v.

Commissioner, 71 T.C. 587, 596 (1979).

The facts relied upon by respondent must be viewed in the light most favorable to petitioner so that any doubt as to the existence of a genuine issue of material fact will be resolved in favor of denying the motion. Adickes v. S.H. Kress & Co., supra; United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nevertheless, the motion must be granted if the Court is satisfied that no real factual controversy is present, so that the remedy can serve "its salutary purpose in avoiding a useless, expensive and time consuming trial where there is no genuine, material fact issue to be tried." Lyons v. Board of Education of Charleston, 523 F.2d 340, 347 (8th Cir. 1975). Finally, petitioner, as the party opposing summary judgment, may not simply rest upon the mere allegations or denials of his pleading; his



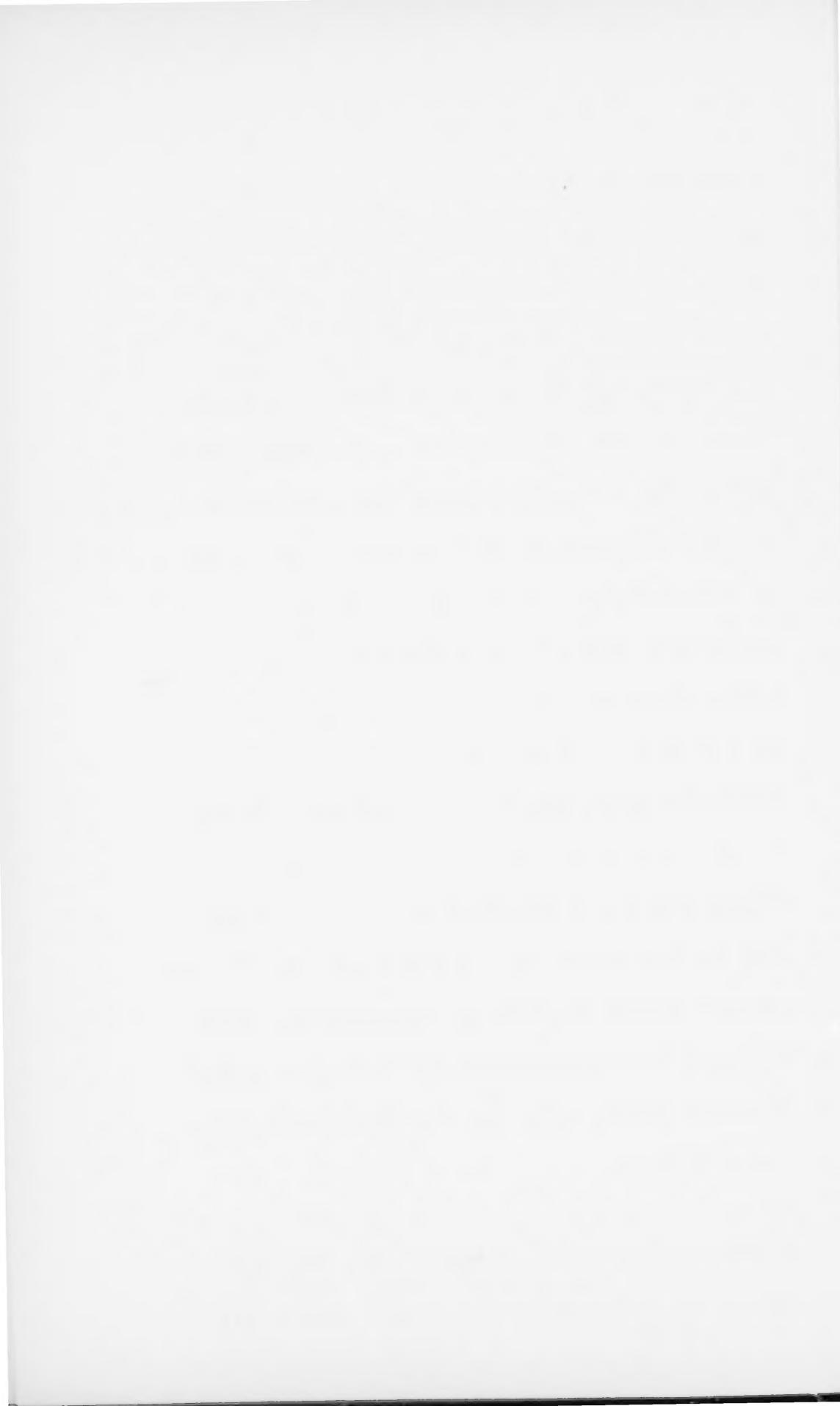
response, by affidavit or otherwise, must set forth some specific facts showing that there is a genuine issue for trial.

Rule 121(d).

Applying these rules, and considering the facts which are established herein by the pleadings, the uncontroverted affidavits and exhibits attached to the motion for summary judgment and response, and the statements and concessions made by the parties at argument on the motion for summary judgment, we conclude that there is no genuine issue of any material fact as to the first three issues presented above, and they may be resolved as a matter of law.<sup>2</sup> The fourth issue raised by respondent, concerning the assessment of damages under section 6673, will be further discussed hereinafter.

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2 Respondent has alleged, and petitioner at argument has agreed, that there are no material and operative facts which are in dispute.



The material and operative facts thus established in this record are as follows:

The petitioner, for the years here in issue and for an undetermined number of years prior thereto, was a judge of the Circuit Court in the Michigan state court system. His compensation as a judge was paid to him in part by the State of Michigan and in part by the County of Oakland, Michigan, and in the years in question he was paid the following salaries:

<u>YEAR</u>	<u>COMPENSATION</u>
1972	\$38,200.00
1973	39,700.05
1974	41,674.58
1975	41,958.98

These amounts were disclosed in schedules attached to petitioner's income tax returns for the respective years, in which petitioner notified the Internal



Revenue Service that his judicial salary was excludible from his taxable income for Federal income tax purposes under the provisions of the United States Constitution. Petitioner accordingly showed zero net taxable income on his returns for each year and, since both the State of Michigan and the County of Oakland had withheld Federal income tax from his salary, showed such tax withholdings as overpayments of income tax, and filed his returns on that basis, electing in each year to have the alleged overpayment of tax refunded to him. On the basis of these returns, and without further action by petitioner, the Internal Revenue Service refunded to petitioner the amounts withheld, in the respective amounts of \$6,722.16, \$7,197.29, \$6,310.00 and \$5,706.00.

At the time of filing his 1972, 1973 and 1974 returns, petitioner had a



case pending before this Court involving the taxability of his state court judge's salary for the years 1969, 1970 and 1971. Said issue was resolved against him in Beer v. Commissioner, 64 T.C. 879 (Opinion filed August 18, 1975), but at the time of filing his return for 1975 an appeal to the United States Court of Appeals for the Sixth Circuit was still pending. Petitioner's appeal was dismissed by the Sixth Circuit by unpublished opinion dated November 22, 1976, 77-2 USTC par. 9491, certiorari was denied by the Supreme Court in 1977, 431 U.S. 938, and petitioner's petition for rehearing was denied, 434 U.S. 1052 (1978). The petition in the instant case was filed herein on October 20, 1980, after the decision in the earlier case had become final.

Prior to the issuance of his statutory notice of deficiency in the instant case, respondent had secured



successive extensions of the statute of limitations from petitioner, extending the time within which respondent could issue his statutory notice of deficiency, the latest extension running until December 30, 1980. Respondent's statutory notice was issued prior to the expiration of that time.

Addressing the issues raised by petitioner in the order stated above:

1. Petitioner argues that respondent's sole remedy to recover the refunds of withheld income tax made to petitioner is by the institution of suit against him under the provisions of section 7405(b),<sup>3</sup> but petitioner is mistaken.

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<sup>3</sup>Section 7405(b) provides as follows:

(b) Refunds Otherwise Erroneous. - Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.



Where income taxes are involved, as here, and where the tax in dispute between the parties is within the definition of a "deficiency," as provided in section 6211, as it is here, respondent is authorized to employ the procedures authorized by sections 6211 through 6214, and issue a statutory notice of deficiency to the taxpayer within the limitations period provided by section 6501, or any extension thereof to which the parties have agreed, section 6501(c)(4). Respondent in this case thus had the option of proceeding by suit under section 7405(b), or following the notice of deficiency procedures prescribed by sections 6211 through 6214 with respect to the amounts which he had refunded;<sup>4</sup> he chose the latter route,

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<sup>4</sup>The options which respondent had, however, were not coextensive. He could have brought suit under section 7405(b) only for the amounts actually refunded, which for each year were less than the amount of tax which respondent determined to be owing.



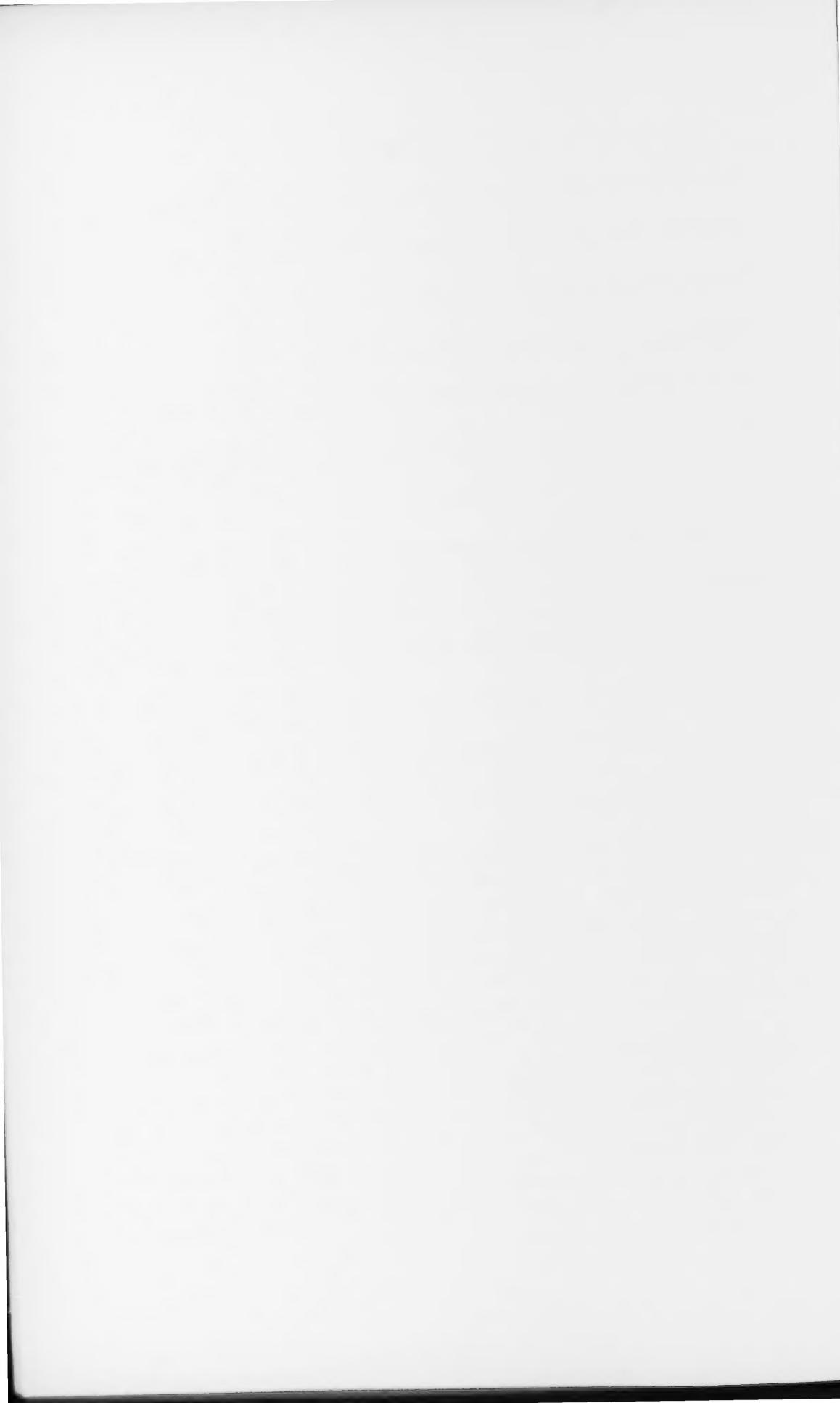
including the refunds made in the larger amount of deficiency determined for each year, and he was entitled to do so.

Warner v. Commissioner, 526 F. 2d 1 (9th Cir. 1975); Krieger v. Commissioner, 64 T.C. 214 (1975); see Pesch v. Commissioner, 78 T.C. 100, 117 (1982). We find no error in the procedure employed here by respondent.<sup>5</sup>

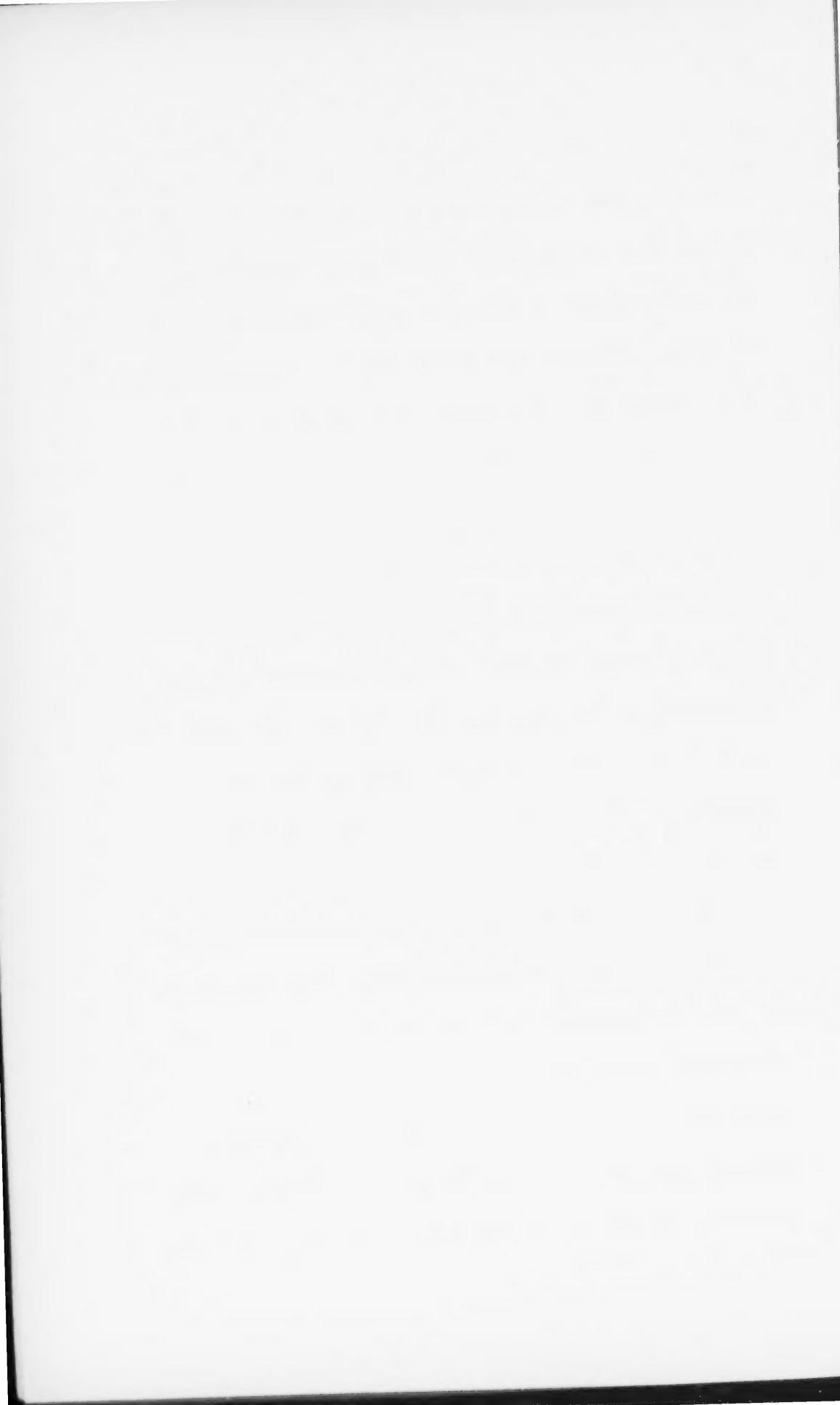
Petitioner further complains that the waivers concededly given by him to respondent, extending the period of

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<sup>5</sup>On brief, petitioner has suggested that respondent's joint statutory notice, addressed to himself and Dora Beer, although concededly sent to an received by petitioner, was never received by Dora Beer, so that the prescribed notification procedures of sections 6211-6214 were not followed. Such alleged fact is unexplained and unsupported in this record, but in any case we do not need to consider it, since (a) any insufficiency of the statutory notice as to Dora Beer is not before us, she not having appealed therefrom to this Court, and (b) petitioner's liability with respect to his joint returns is both joint and several, section 6013(d)(3).



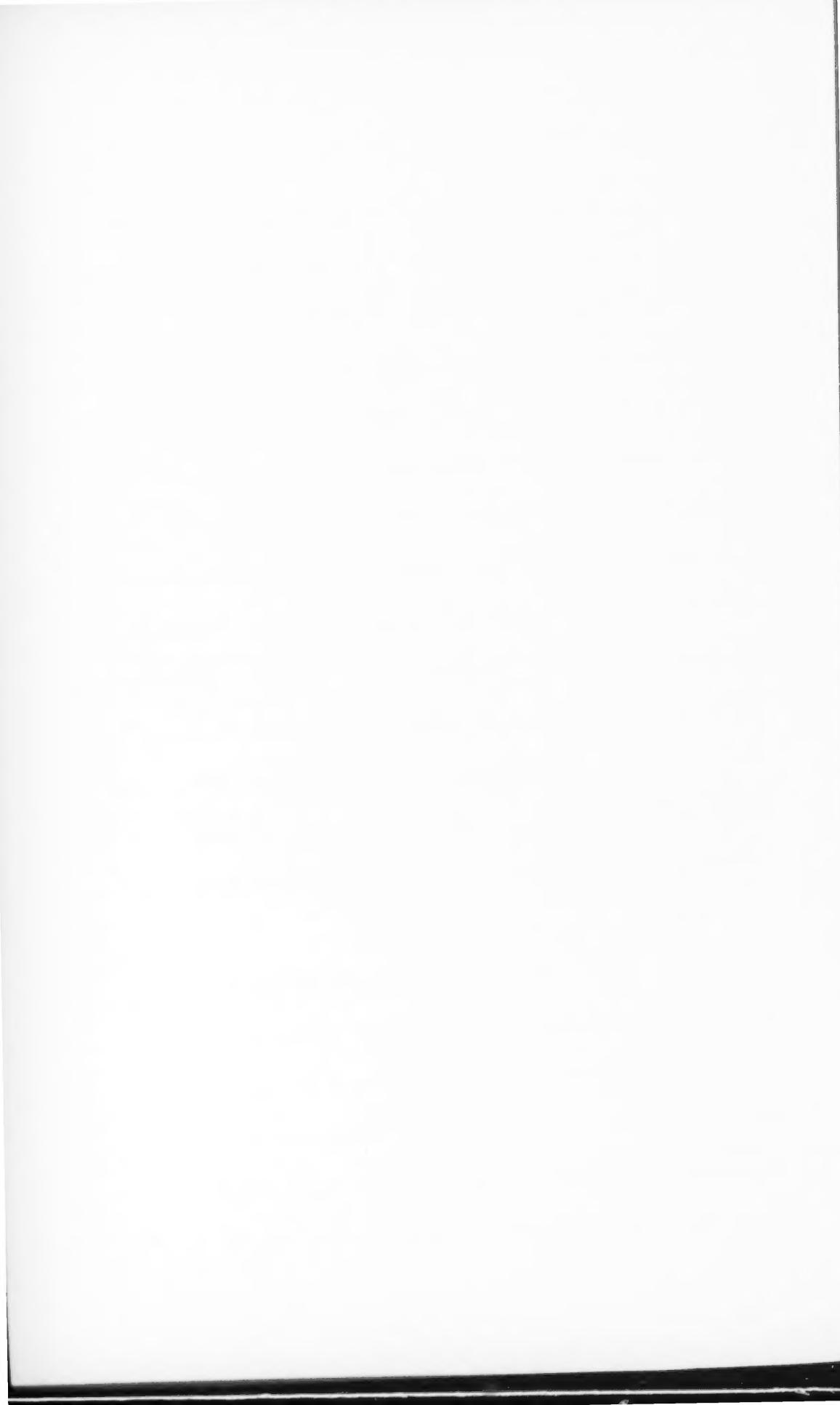
limitations within which respondent could issue his statutory notice of deficiency, were invalid, claiming that the granting of such extensions of time by him were void because they were not supported by consideration. Petitioner's argument is without merit. There is no requirement that extensions of the statute of limitations of the type involved in this case be supported by any consideration, Stern Brothers & Co. v. Burnet, 51 F. 2d 1042 (8th Cir. 1931); Loewer Realty Co. v. Anderson, 31 F. 2d 268 (2d Cir. 1929); in any case, such consideration exists in the instant case through the forbearance of the respondent in delaying the issuance of his statutory notice of deficiency in reliance upon the extensions of time granted by petitioner. Hotel Wisconsin Realty Co. v. Commissioner, 16 B.T.A. 334 (1929), affd. 47 F.2d 842 (7th Cir. 1931);



Martin v. Commissioner, T.C. Memo. 1963-26.

2. With respect to the taxability of petitioner's salary as a Michigan state judge, the situation is exactly the same as it was in petitioner's prior case before this Court. Beer v. Commissioner, supra. It has been clear for many years that there is no constitutional prohibition to imposing the Federal income tax on salaries of state or Federal officials, Graves v. New York, 306 U.S. 466 (1939); O'Malley v. Woodrough, 307 U.S. 277 (1939). Such salaries, being clearly included within the provisions of section 61, are taxable.

3. Petitioner next contends, without citation of relevant authority, that respondent is somehow estopped from determining the instant deficiencies against petitioner because, says petitioner, respondent refunded the taxes



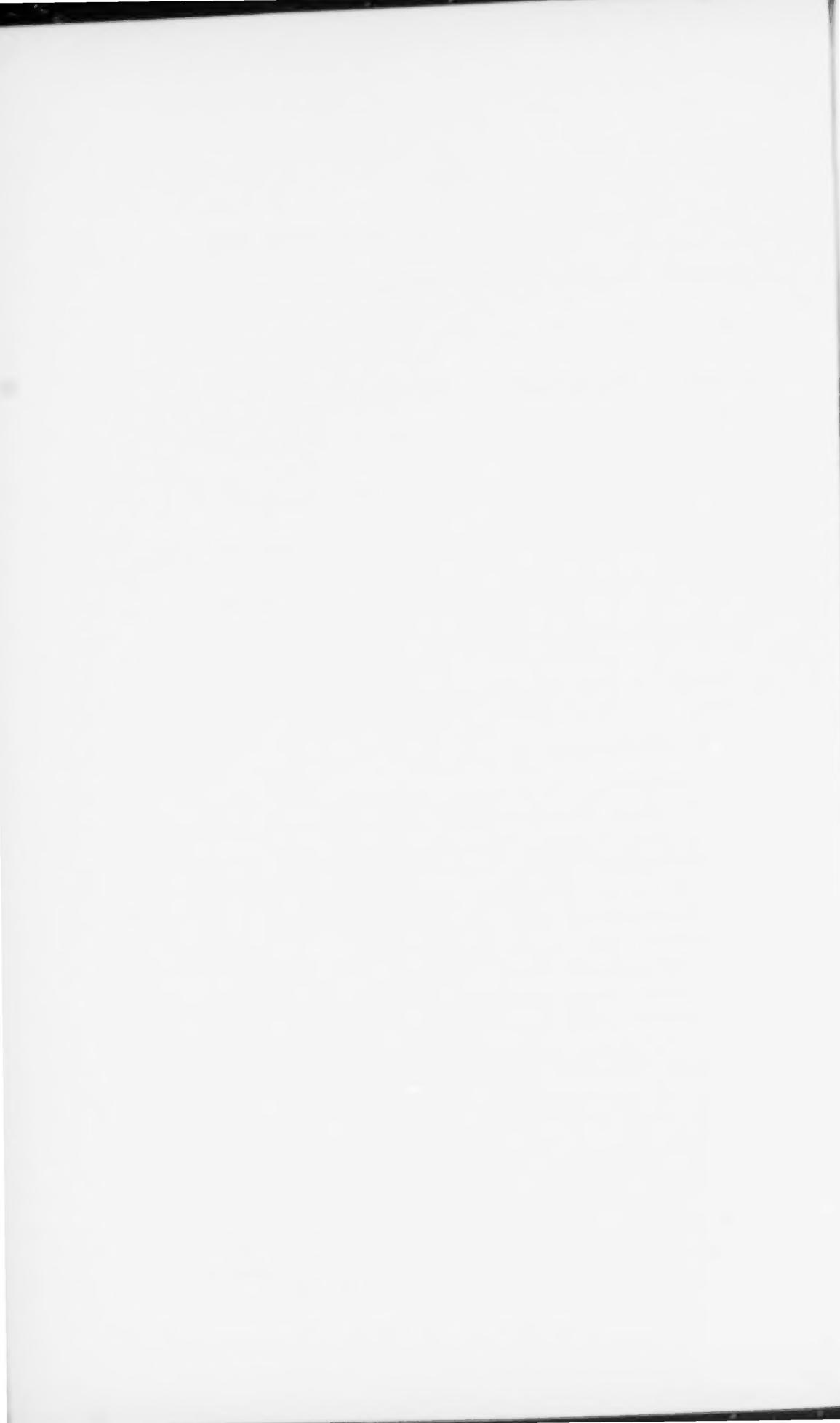
withheld from petitioner's salary for the years here in issue with the full knowledge of all the facts involved, and without any fraud or misrepresentation on the part of petitioner. It may be conceded that there was no concealment, misrepresentation or any other action by petitioner herein which misled respondent. Petitioner's position, and the necessary facts in relation thereto, were fully disclosed, and respondent refunded the income taxes withheld from petitioner's salary on the basis of petitioner's returns. It is clear from our holding on the preceding point that respondent's action in refunding the withheld taxes was erroneous; such error, however, was based upon respondent's mistake as to the law, not as to any operative



fact.<sup>6</sup> Petitioner does not have any vested rights in respondent's mistaken interpretation of the law, Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957), and, where respondent has made an erroneous refund of tax through a mistaken interpretation of the law, respondent is not estopped from correcting such mistake by following allowable deficiency procedures, as here.

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<sup>6</sup>The refunds were made during the same period that respondent was (successfully) urging petitioner's liability for tax on his judicial salary for 1969-1971. In today's labyrinthine government, it appears that sometimes the right hand does not know what the left hand does. A partial explanation of this case may be that under our "pay-as-you-go" system, refunds of alleged excess withholdings from wages, without prior audit, are a matter of grace to the taxpayer, made in consequence of an amount due as shown on his return, and are subject to final audit and adjustment, and hence are not final determinations so as to preclude subsequent adjustments. Clark v. Commissioner, 158 F2d 851 (6th Cir. 1946) affirming a Memorandum Opinion of this Court; Owens v. Commissioner, 50 T.C. 577 (1968).



Warner v. Commissioner, supra.<sup>7</sup>

It is clear, therefore, that respondent is entitled to prevail as a matter of law on the three issues raised by petitioner.

This leaves for consideration respondent's claim that damages in the amount of \$500 should be awarded to him herein under the provisions of section 6673. That section provides:

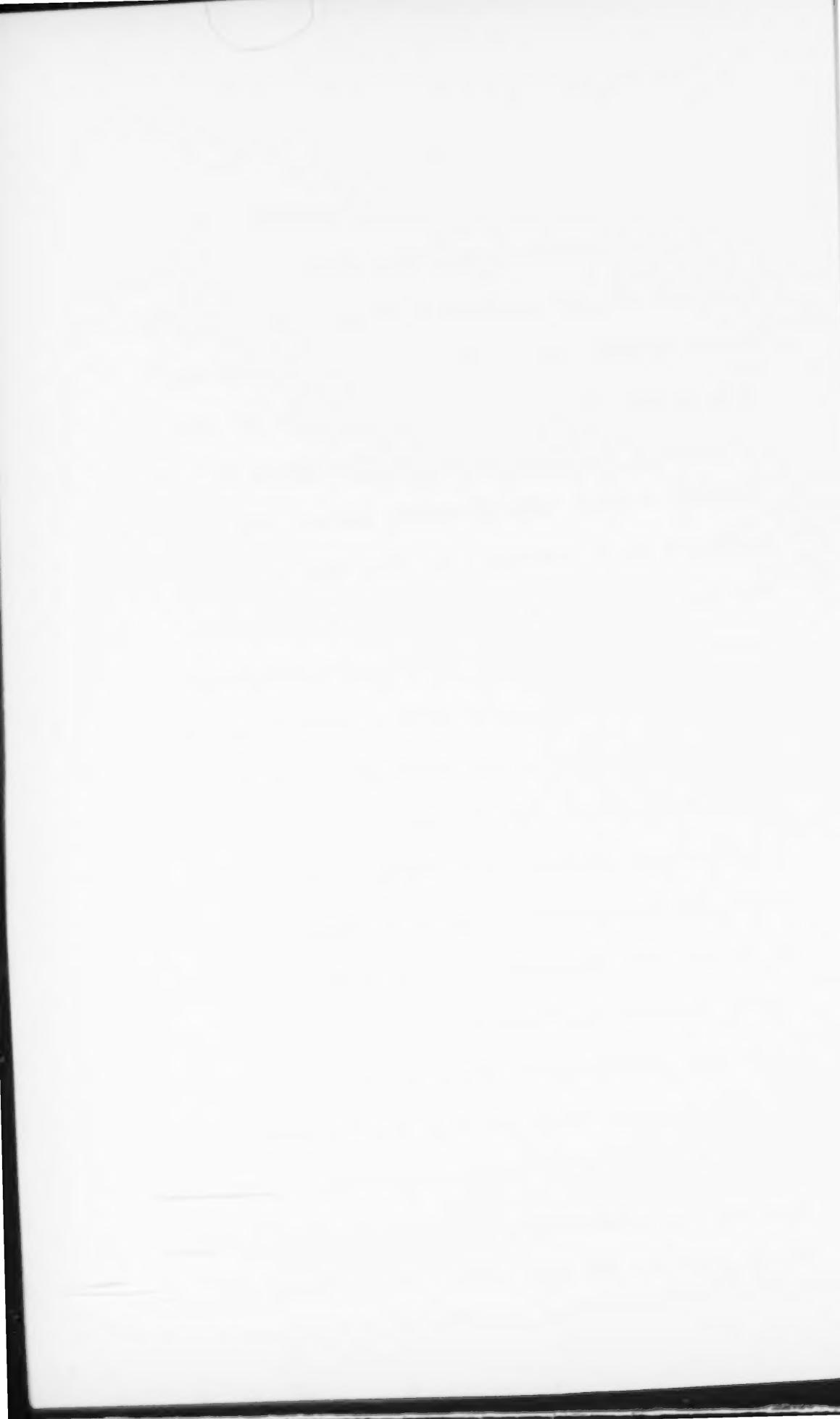
Whenever it appears to the Tax Court that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of \$500 shall be awarded to the United States by the Tax Court at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as a part of the tax.

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<sup>7</sup> There clearly can be no argument by petitioner that he relied on respondent's mistaken refund to his detriment. Petitioner initiated this whole imbroglio by the returns which he filed; if anyone benefitted, he did. Cf. Estate of Ashenhurst c. Commissioner, T.C. Memo. 1982-102.



So far as the substantive issue in this case is involved, viz., the taxability of petitioner's salary as a state court judge, petitioner's prior case in this Court was fully dispositive of the question, and petitioner knew this before he instituted the present case. He had pursued this matter all the way to the Supreme Court, and his position was rejected, on the basis of ample authority. If this were the only issue before us in the present case, and bearing in mind that petitioner is not only a lawyer but a long-time judge, and therefore should know the unsoundness of his legal position, we might be inclined, as we have done in other cases, to find that the instant case was instituted merely for purposes of delay, and that an award of damages under section 6673 was warranted. Compare Syndes v. Commissioner, 74 T.C. 864 (1980), affd. 647 F. 2d 318 (8th Cir. 1981);



Graves v. Commissioner, an unreported case (6th Cir. 1982, 82-1 USTC par. 9223), affirming a Memorandum Opinion of this Court; Hatfield v. Commissioner, 68 T.C. 895 (1977).

In the instant case, however, issues were raised by procedural issues regarding the correctness of the notice of deficiency procedure, the statute of limitations question and the estoppel question. Although petitioner was clearly wrong as to these points, and although we have some doubts as to his sincerity in raising them herein, we forbear in this case to impose damages against him under section 6673, bearing in mind that these were issues not passed upon in the earlier case, and also bearing in mind that on motion for summary judgment, as here, all doubts as to the existence of a genuine issue should be resolved in



favor of the party opposing the motion.

Heyman v. Commerce and Industry Ins. Co.,  
524 F.2d 1317, 1320 (2d Cir. 1975).

Accordingly, although we refrain in this case from assessing damages against petitioner, we point out to him that if in the future he brings or maintains a similar action involving the constitutional taxability of his salary, an issue as to which there can no longer be any reasonable debate, the Court may well be inclined to impose such damages or even greater damages up to \$5,000, as now authorized by section 6673 for suits commenced in this Court after December 31, 1982. Section 292(b), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324, 574.

An appropriate order and  
decision will be entered.



RECOMMENDED FOR FULL TEXT PUBLICATION  
See, Sixth Circuit Rule 24

No. 83-1386

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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WILLIAM J. BEER,  
*Petitioner-Appellant,*  
v.  
COMMISSIONER OF INTERNAL REVENUE,  
*Respondent-Appellee.*

ON APPEAL from the  
United States Tax  
Court.

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Decided and Filed May 8, 1984

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Before: CONTIE and WELLFORD, Circuit Judges; PECK, Senior Circuit Judge.

PER CURIAM. Petitioner, William John Beer, appeals from the decision of the Tax Court granting the summary judgment motion of the Commissioner of Internal Revenue (Commissioner) and sustaining the Commissioner's determination that petitioner was liable for income tax deficiencies totalling \$30,622.52 for the years 1972-1975.

Petitioner, a lawyer and a judge of the Michigan Circuit Court, filed federal income tax returns for the tax years 1972-1975. In each of these returns he set forth the income he received as a state court judge but claimed that this income was exempt from federal taxation under the United States



Constitution. He therefore claimed the amounts withheld from his salary as a refund. The Internal Revenue Service refunded the amounts withheld routinely on the basis of the refund request on the face of the returns.

Petitioner, at the time of filing these returns, was engaged in litigating his tax liabilities for the tax years 1969-1971 under a similar claim of constitutional immunity from taxation. This claim proved unsuccessful. *See Beer v. Commissioner of Internal Revenue*, 64 T.C. 879 (1975), aff'd without published opinion, 77-2 U.S.T.C. at ¶ 9491 (6th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977).

During the pendency of this earlier case, the Commissioner, through a series of agreements, allowed petitioner an extension of time for the issuance of a deficiency notice in connection with the tax years involved in the instant case. The last such agreement expired on December 30, 1980; by that time, however, the Commissioner had issued a deficiency notice to petitioner, and petitioner had instituted this action.

The Tax Court again rejected the petitioner's contention, unsupported by any substantial authority, that his judicial salary was constitutionally exempt from taxation. It also rejected petitioner's contention that the Commissioner had failed to seek the proper remedy for recovery of the taxes at issue, and petitioner's argument that the refund of the withheld taxes estopped the Commissioner from seeking recovery of the taxes.

On appeal, petitioner contends that I.R.C. § 7405(b) providing that the United States may recover in a civil action any portion of a tax that has been "erroneously refunded" is the Commissioner's sole remedy, which is time barred because the Commissioner failed to bring such a suit within two years after its refund to petitioner, as required under I.R.C. § 6532 (b). We find that the Tax Court correctly held that the Commissioner had the option of proceeding against petitioner under section 7405 or under the deficiency procedures set forth in sections 6211 through 6216 of the Internal Revenue



Code. See, e.g., *Warner v. Commissioner of Internal Revenue*, 526 F.2d 1 (9th Cir. 1975); *United States v. C & R Investments, Inc.*, 404 F.2d 314 (10th Cir. 1968); *Pesch v. Commissioner of Internal Revenue*, 78 T.C. 100 (1982). Accordingly, since the tax in dispute between the parties is within the definition of "deficiency," see I.R.C. § 6211, the Commissioner's election to utilize the deficiency procedures against petitioner was proper. Furthermore, the Commissioner's notice of deficiency to petitioner issued pursuant to I.R.C. § 6501(c)(4) providing for extension by agreement of the three-year statute of limitations generally applicable under the deficiency procedures, see I.R.C. § 6501(a), was timely. The Commissioner issued its notice of deficiency to petitioner on July 25, 1980, well before the December 30, 1980, expiration date of the last extension agreement between petitioner and Commissioner. Petitioner's argument that his extension agreements were coerced, or made without consideration, particularly in his position as a judge, are simply unfounded.

We also find that the Tax Court correctly held that the refund of the withheld taxes by the Internal Revenue Service did not estop the Commissioner from collecting the deficiency from petitioner. The refunds at issue resulted from a mistake of law in regard to petitioner's claim of constitutional immunity from taxation. The administrative refunds effected did not amount to a final determination of the tax that might ultimately be due; they were subject to final audit and adjustments. *Clark v. Commissioner*, 158 F.2d 851 (6th Cir. 1946); *Rountree v. Commissioner*, 456 F.2d 1110 (6th Cir. 1972). "The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law." *Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 180, 183 (1954). See also *Commissioner of Internal Revenue v. Mooneyhan*, 404 F.2d 522, 528 (6th Cir. 1968), cert. denied, 394 U.S. 1001 (1969) ("The doctrine of equitable estoppel . . . cannot prevent the Commissioner from correcting a mistake of law no matter where respondent was led.").



That the refunds resulted from a mistake of law is clear. It has been settled since 1939 that there is no constitutional prohibition against imposing federal income tax on the salaries of state officials. *See Graves v. New York*, 306 U.S. 468 (1939). On this appeal, petitioner persists in arguing that his salary as a state judge is exempt from federal income tax, despite the sound rejection of a similar claim made by him in *Beer v. Commissioner of Internal Revenue*, *supra*, and by the Tax Court in the proceedings below. While we cannot conclude that the Tax Court erred by not assessing sanctions under I.R.C. § 6673<sup>1</sup> we find that assessment of double costs against petitioner is appropriate in this case.

Accordingly, we affirm the decision of the Tax Court on all issues raised by petitioner, and we assess double costs against the petitioner. 28 U.S.C. § 1912.

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<sup>1</sup> This section provides:

Whenever it appears to the Tax Court that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of \$500.00 shall be awarded to the United States by the Tax Court in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the Secretary and shall be collected as a part of the tax.

This section was amended by section 292(b), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 524, to provide for damages up to \$5,000.00 for those suits commenced in Tax Court after December 31, 1982. The amendment does not affect the instant action since it was commenced in 1980.